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IN THE

Supreme Court of the State of Delaware

OCEAN BAY MART, INC.
Plaintiff-Below/Appellant,
v.
THE CITY OF REHOBOTH BEACH, DELAWARE,
Defendant-Below/Appellee.

NO. 28,2022
On Appeal from the Chancery Court of the State of Delaware in and for New Castle County, C.A. No. 2019-0467-SG

APPELLEES' ANSWERING BRIEF

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NATURE AND STAGE

The Court of Chancery's post-trial decision[1] that Ocean Bay Mart, Inc., and its sole shareholder, Keith Monigle (collectively "Monigle") did not acquire a vested right to proceed with a condominium/site plan application for 58 single family homes and five multi-family dwellings on a single lot for the "Beachwalk" project, and was not otherwise exempt from the provisions in Ordinances 1116-01 and 1016-02 (A171-74), should be affirmed.

At the time of Monigle's Beachwalk application, Rehoboth Beach Code § 270 Attachment 1:1 Table of Use Regulations provided that, in the C-1 District, "no more than one main building may be erected on a single lot." A30. As the Court of Chancery held, "[t]his language does not support the view that no subdivision was required."[2] "Monigle testified at trial that he had never read this language prior to 2015, and thus had no reason to rely on any particular interpretation of the Code."[3] In addition, at the time of the application, 25 *Del. C.* § 81-105(b)(1) of the Delaware Uniform Common Interest Ownership Act ("DUCIOA") stated ". . . each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate." Monigle was also unaware of this

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1 *Ocean Bay Mart, Inc. v. City of Rehoboth Beach*, 2021 WL 4771246, at *1 (Del. Ch. Oct. 13, 2021) (hereafter *Decision* *__). The *Decision* is Exhibit A to Monigle's opening brief ("OB").

2 *Id.* at *9.

3 *Id.*

statute. B255-56. To create a separate parcel of land, a subdivision is required. Yet, Monigle sought to build 63 units *on a single lot* under a condominium regime (58 single-family residences), which would allow him to double the density that he could otherwise obtain if a subdivision application is required. B95-96.

Monigle decries that the *Decision* "overrules established precedent" and "upends that doctrine of vested rights and equitable estoppel and leaves landowners virtually unprotected against zoning code amendments." OB 1, 3. It does no such thing. It is settled that:

- The government may change the law that applies to a given property or application at any time in the land use approval process.[4]

[4] *See In re Kent Cty. Adequate Pub. Facilities Ordinances Litig.*, 2009 WL 445386, at *4, *8 (Del. Ch. Feb. 11, 2009), *rev'd on other grounds, Chase Alexa, LLC v. Kent Cty. Levy Ct.*, 992 A.2d 1148 (Del. 2010) (applying the vested rights test to an ordinance amendment); *Kejand v. Bd. of Adj. of Town of Dewey Beach,* 1993 WL 189536, at *4 (Del. Super. May 14, 1993), *aff'd,* 634 A.2d 938 (Table) (Del. 1993); *Raley v. Stango*, 1988 WL 81162, at *2–6 (Del. Ch. July 28, 1988) (holding that later adopted zoning amendments apply to a portion of a condominium regime); *Sienna Corp. v. Mayor & Council of Rockville Md.*, 873 F.3d 456, 460–64 (4th Cir. 2017) (after plans were submitted for a self-storage facility, for which the Planning Commission had granted conditional approvals, the Town Council was permitted to change applicable zoning laws to prohibit the proposed use); *Ark. Riverview Dev't. LLC v. City of Little Rock,* 2006 WL 2661158, at *3 (E.D. Ark. Sept. 15, 2006) ("no property right exists in the permit . . . because 'property is not exempt from the operation of subsequent ordinances and regulations legally enacted by the [municipal] corporation.'") (internal quotation omitted).

- There is no vested right that prevents a change in the law applicable to any zoning classification,[5] subdivision approval,[6] or other application for a land use permit.[7]

- It is the property owner's responsibility to know the regulations applicable to its land, even if a government actor provides an incorrect interpretation of the applicable municipal codes.[8]

- Absent a statutory provision, a vested right against an ordinance amendment may only be established through equitable balancing

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[5] *Croda, Inc. v. New Castle Cty.,* 2021 WL 5027005, at *4 (Del. Ch. Oct. 28, 2021); *Kappa Alpha Ed. Found., Inc. v. City of Newark*, C.A. No. N19M-10-175-ALR (Del. Super. Dec. 17, 2019) (unreported) (B84-85); *Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966); *Acierno v. Cloutier*, 40 F.3d 597, 620 n.17 (3d Cir. 1994); *Mayor & Council of New Castle v. Rollins Outdoor Advert., Inc.*, 475 A.2d 355, 360 (Del. 1984); *Reinbacher v. Conly*, 141 A.2d 453, 457 (Del. Ch. 1958).

[6] The approval of a subdivision plan does not establish vested rights and "no court . . . has adopted such a broad conception of vested rights." *Acierno*, 40 F.3d at 619; *L.M. Everhart Constr., Inc. v. Jefferson Cty. Planning Comm'n,* 2 F.3d 48, 52 (4th Cir. 1993); *Bianchi v. City of Cupertino*, 944 F.2d 908, 1991 WL 178156, at *3 (Table) (N.D. Ca. Sept. 12, 1991) ("appellants acquired no vested right by the mere recordation of the subdivision map").

[7] *Croda,* 2021 WL 5027005, at *4 ("Even where a property owner applies for and receives a permit, the property owner does not have a per se right against a later zoning change."); *Kejand,* 1993 WL 189536, at *4 ("[i]t is a generally accepted rule in Delaware courts that a person applying for a permit for a proposed use of land which is permitted by an ordinance in effect at the time the application was submitted is subject to a subsequent amendment of that ordinance, unless the applicant has acquired a vested right in the proposed use or he is entitled to equitable estoppel.").

[8] *Beiser v. Bd. of Adj. of Town of Dewey Beach,* 1991 WL 236966, at *5 (Del. Super. Oct. 25, 1991) ("the threshold question is whose responsibility is it to know the zoning regulations and how they affect the property in question. In Delaware, it is the property owner's responsibility."); *see also Lowe's Home Ctrs., Inc. v. Old Meadow Props., L.L.C.*, 2001 WL 1729123, at *5 (Del. Super. Nov. 30, 2001) (same); *Voshell v. Bd. of Adj. of Kent Cty.*, 1995 WL 656802, at *3 (Del. Super. Sept. 5, 1995); *Cheng v. D'Onofrio*, 1994 WL 560866, at *3 (Del. Ch. Sept. 20, 1994).

of numerous factors, as articulated by this Court in *Town of Cheswold*.[9]

- Even if a property owner acquired a vested right (and Monigle has not established a vested right here), a statute may retroactively reach property rights which have vested and may create new obligations with respect thereto, provided that the statute is a valid exercise of police power.[10]

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After the City received the Beachwalk application, the Building Inspector advised Monigle that the site plan did not comply with the requirements in the Table of Use Regulations. A152. The City of Rehoboth Beach's Board of Adjustment ("BOA") on appeal decided that the one main building per lot language was ambiguous. A157-59.

Instead of appealing that decision, the City, in August of 2016 (*see* A162-63), introduced Ordinance 1116-01"to affirm the Building [and Licensing] Official's interpretation of the referenced code provision [in the Table of Use Regulations] and to remove any uncertainty in its application." A173-74. The City also introduced Ordinance 1016-02, which required that the "primary entrance to any one or two-family dwelling shall be located within 100 feet of a public street." A171-72. Both Ordinances are effective upon adoption.

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[9] *Town of Cheswold v. Cent. Del. Bus. Park,* 188 A.3d 810, 821 n.62 (Del. 2018) (hereinafter *Cheswold*).

[10] *Id.* at n.58; *Price v. All Am. Eng'g. Co.*, 320 A.2d 336, 340 (Del. 1974).

Almost simultaneously with the consideration and adoption of Ordinances 1116-01 and 1016-02, the Planning Commission considered Monigle's application and held that, under DUCIOA, a major subdivision was required for Beachwalk because each unit in a condominium regime constitutes a separate parcel of land – which would require a major subdivision under the City Code. *See* B10; A181-88. Thereafter, the City Commissioners, in an on the record appellate review, affirmed the Planning Commission's determination. A181-88. Monigle then sought a writ of *certiorari* challenging the decision in the Superior Court.

The City moved to dismiss the *certiorari* petition (A039), and filed a separate declaratory judgment action, arguing that the *certiorari* petition was mooted by the adoption of Ordinances 1116-01 and 1016-02. B37-49. The Superior Court, however, did not address the City's contention that Ordinances 1116-01 and 1016-02 are applicable to Beachwalk. The Superior Court held that the issue "should be addressed there [the City] first and not raised here for the first time on *certiorari* review." B50-51.[11]

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[11] City moved for a partial final judgment pursuant to Rule 54(b) in the *certiorari* action, which the Superior Court denied and held that, due to the remand, only an interlocutory appeal was permitted. B78-80. Thus, the City has not had an opportunity to appeal the Superior Court's decision – which the City believes is wrongly decided because *inter alia,* the Superior Court erred in gleaning legislative intent from the title of the Code which is improper under Delaware law. *See* 1 *Del. C.* §§ 305-306.

Pursuant to the Superior Court's instruction, on May 17, 2019, the City addressed the applicability of Ordinance 1016-02 and Ordinance 1116-01 to pending applications such as Beachwalk by considering and passing Ordinance 0519-01 (the "2019 Ordinance").[12] A189-90; B57-77. After adoption of the 2019 Ordinance, Monigle filed the underlying action – seeking a declaration of vested rights and for equitable estoppel relief.

The Court of Chancery denied cross-motions for summary judgment and advised the parties that this case turns on a "very narrow factual issue." B206-09. Specifically, "whether . . . [Monigle], when [he] began planning its redevelopment as a condominium rather than a subdivision, was entitled to rely in good faith on its interpretation of the City Code existing at the time." *Id*. A one-day trial was held on July 23, 2021, and the parties submitted written closing statements. B313-33.

On October 13, 2021, the Court of Chancery issued the *Decision* rejecting Monigle's claims of a vested right and for equitable estoppel. OB Ex. A. Monigle moved for reargument, which was denied. OB Ex. B. Monigle thereafter appealed and filed his opening brief on April 15, 2022. This is the City's answering brief.

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[12] Monigle does not dispute that the 2019 Ordinance was enacted in direct response to the Superior Court's command that applicability of the 2016 Ordinances "should be addressed there [the City] first and not raised here for the first time on certiorari review." B50-51. While Monigle attempts to claim a change in the law in 2019 (OB 33), the law was actually clarified in 2016 via adoption of Ordinances 1016-02 and 1116-10. No substantive provisions in the code changed via the 2019 Ordinance.

SUMMARY OF ARGUMENT

1. **Denied.** It is settled law in Delaware that there is no vested right to any land use ordinance, and a subsequent ruling by the BOA that a particular code section is ambiguous does not preclude amendments to the code to clarify any purported ambiguity. "Plaintiff was on notice that the City may have intended the more restrictive interpretation, and thus might clarify the law to accomplish that intent (as, in fact, it did)."[13] Plaintiff also could not have relied on a law that he admittedly never read. He could not reasonably rely on an opaque e-mail about a different property in a different zoning classification when it is the property owner's responsibility to know the law applicable to its lands.[14]

2. **Denied.** Monigle misreads and misinterprets the Ordinances, which are unquestionably effective upon adoption. There is no provision in the Ordinances that exempt pending plans. The law does not require any affirmative statement to have the new law apply to pending applications – when the law is effective upon adoption, it is effective immediately and applies to *all* properties – including pending applications.

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13 *Decision* *10.

14 *See supra* n.8. Monigle's property is zoned C-1. B247. The exchange between the Building Inspector and Ms. Newcomb (A053-55) only addresses R-2 and C-3 Districts – and it was written for a different property.

3. **Denied.** An opaque communication with the Building Inspector regarding a different property with a different zoning classification, when the property owner actively avoided subdivision review, and did not share any details of his plans with the City in advance of application, (which would create the largest condominium complex in the City with 58 single family dwellings on a single lot) this cannot establish any valid good faith reliance that no subdivision would be required.

STATEMENT OF FACTS

A. Facts Established at Trial Regarding Monigle's Reliance on the State of the Code Prior To Submission of the Beachwalk Site Plan

Sometime in 2012, Monigle began preparing development plans for Beachwalk. A033. When investigating whether Beachwalk could be developed as a site plan, Monigle testified that he relied on his reading of the code to determine if a site plan condominium, instead of a subdivision, could be submitted. B242-43, 245. Monigle, however, testified that he did not read the Table of Use Regulations (and the one building per lot requirement) prior to creating plans and spending engineering fees for Beachwalk.

> Q. So you didn't review this [the table of use regulations] prior to the submission of the Beach Walk application; is that correct?
>
> A. That's correct.
>
> . . .
>
> Q. And just to be clear, you were not aware of this language before you submitted the site plan for BeachWalk?
>
> A. I wasn't.

B246; B248.

Similarly, he testified that he never read or considered 25 *Del. C.* § 81-105(b)(1) prior to submitting the Beachwalk site plan for review. B256-57. And, he never received an opinion from his team regarding the DUCIOA language prior to submitting the Beachwalk application. B260. Monigle did, however, receive an

opinion from one of his attorneys, Michael Smith, who advised Monigle that "he was convinced that we were in fact a SUBDIVISION." B259; B1.[15]

What is patently clear is that, prior to submitting the Beachwalk site plan to the City, Monigle's goal (as reiterated at trial) was to avoid becoming a subdivision.

> Q. . . . and the goals were . . . "to avoid becoming any sort of subdivision," Isn't that correct?
>
> A. That's right.

B268.[16]

Under the Rehoboth Beach Code, Monigle had the option of pursuing project concept review, which would have allowed the City the opportunity to informally review Monigle's potential development he commited substantial time and expense preparing a formal site plan.[17] Monigle testified:

> Q. And you elected not to submit for concept plan review; isn't that correct?
>
> A. That's correct.
>
> Q. And you also wanted to avoid becoming a subdivision?
>
> A. Yes.

B273.[18]

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[15] Monigle testified that Mr. Smith later changed his mind on the subdivision issue, but Monigle did not proffer Mr. Smith as a witness at trial in this regard. B279.

[16] *See also* B4 ("The goals are: . . . [t]o avoid becoming any sort of a subdivision").

[17] Rehoboth Beach Code § 236-31 A.

[18] Monigle was aware of the project concept review process prior to plan submission. *See* B5; B7.

Monigle himself never approached the City about any plan for his proposed development prior to submitting the site plan in 2015. He testified:

> Q. So, again, you didn't have any discussions with the City about the specifics of the Beachwalk project until formal application was made; correct?
>
> A. I did not have any formal discussions with anyone from the City prior to submission of the BeachWalk plan. . . .

. . .

> Q. Isn't it true that, ultimately . . . you never went to the City and said, "this is what I want to build" and provided your team's view of the BeachWalk plan to the City of Rehoboth Beach before you actually submitted the plan; isn't that correct?
>
> A. That's right.

B270-71; B278.

Although Monigle had zero knowledge of the language in the Table of Use Regulations' one main building per lot requirement, or of the provisions of DUCOIA, and even though his stated goal was to avoid becoming a subdivision (so he could double the density otherwise allowed by the subdivision regulations) (B95-96) he claims to have detrimentally relied upon two separate representations to third parties: (1) realtor Kathy Newcomb's communication with then City Building Inspector Terry Sullivan about a different property; and (2) Dennis Schrader's limited conversation with Glenn Mandalas in 2014 regarding whether a condo is a subdivision. *Id*.

Ms. Newcomb testified that during her August 20, 2013 meeting with Building Inspector Sullivan, she brought her colleague Rob Burton, because Burton had a similar parcel for sale and desired to ask some questions regarding that property – a property that had a different zoning classification. *See* B264; B290. Newcomb further testified that Burton asked specific questions about his parcel, while she asked only general zoning questions. B290. Newcomb never specifically discussed Monigle's plans nor provided draft plans to Sullivan. B295. Newcomb's correspondence did not address the applicability of the Table of Use Regulations' one main building per lot limitation or DUCIOA to Monigle's property. B263; A53. Any statement made by Sullivan was not based on actual knowledge of Monigle's plans to build 58 single-family detached units and five attached units on a single lot. B295-96. And contrary to Monigle's assertions in his opening brief, Newcomb never discussed the one main building per lot limitation in the Table of Use Regulations with the Building Inspector.[19]

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[19] Monigle's OB at pages 11-12 (and repeated throughout the opening brief) create a fictional account of the testimony offered at trial regarding the discussions about the applicability of the Table of Use Regulations. Monigle testified accurately that Newcomb's correspondence with the building inspector does not address the Table of Use Regulations or DUCIOA, and it does not address the Beachwalk project at all. B264. Indeed, the correspondence makes no reference to the Table of Use Regulations. A99-100. Newcomb's direct examination does not mention the Table of Use Regulations whatsoever. B287-93. She was asked on cross "Q. And at any time in your discussions . . . you didn't discuss with Ms. Sullivan the table of use regulations in the code? A. Only as it relates to the subordinate nature of the

Likewise, Dennis Schrader, when speaking with City Solicitor Glenn Mandalas for approximately fifteen to thirty minutes (B303), did not engage in a discussion which included the specifics of Monigle's application or the number of single-family detached units proposed. B303. The applicability of the Table of Use Regulations or DUCIOA provisions was not discussed. B302. Indeed, Schrader confirmed his only concern was "condo versus subdivision" and "[t]he only thing that was of interest. . . was the process, rather than the finite requirements of the site plan. I was just curious to know condo versus subdivision." B303. There was no discussion of the Table of Use Regulations' limitation of no more than one main building on a single lot.

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structures." B296. It is from this one very limited statement that Monigle's brief contends that "Ms. Newcomb specifically asked Ms. Sullivan about footnote 1 . . . to the 'Table of use Regulations.'" OB 11. These contentions have no record support. Tellingly, this purported "specific discussion" of the footnote in the Table Use Regulations was not mentioned in Monigle's closing statement (A309-330) or in its Motion for Reargument. A331-42.

B. The Beachwalk Site Plan Application

Monigle submitted the Beachwalk site plan application on June 18, 2015.[20] Following PLUS review and initial plan comments,[21] on November 20, 2015, the City's Building Inspector advised Monigle that, due to the language in the Table of Use Regulations, the Beachwalk site plan is not compliant with the code because it cannot have more than one main building on a single lot and therefore a subdivision is plan required. A152-53. Monigle appealed that decision to the City's BOA, and argued, *inter alia*, that the requirement that no more than one main building can be erected on a single lot is somehow ambiguous. A157-59. On May 23, 2016, the BOA ruled that the no more than one main building on a single lot language in the Table of Use Regulations was ambiguous. *Id.*

On August 12, 2016, the City's Planning Commission sought briefing on whether DUCIOA requires a major subdivision plan for Beachwalk. A036. Also in August (OB 17, A162), the City Commissioners proposed Ordinances 1116-01 and 1016-02, which were discussed at a September 7, 2016 workshop. A036-37.

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[20] Soon after, on July 7, 2015, Monigle wrote to his engineer about being contacted by the Planning Commission about project concept review. Regarding that process, Monigle states "you remember, where the perspective applicant lays out his cards and the town then has the opportunity to adjust the code!" B6; *Decision* *3, 11.

[21] Upon submission, the City noted that the application had numerous fatal flaws independent of the one building per lot requirement, and it was returned to the applicant for further revision. B7-8. The contention that the site plan remains compliant with the law that existed in 2015 (OB 7) is simply incorrect.

Ordinance 1016-02 was adopted on October 23, 2016, on the same date as the Planning Commission held that the Beachwalk application requires a major subdivision under the language of 25 *Del. C.* § 81-105(b)(1). B11; A181-88. Ordinance 1116-01 was adopted on November 18, 2016.

Ordinance 1116-01 states, in pertinent part, that:

> WHEREAS, thereafter the Zoning Code permits within the R-1 District "Any use permitted in the R-1(S) District under § 270-10C of this article.", and thereafter as one of the permitted uses within the R-2 District "Any use permitted in the R-1 District under § 270-11C of this article.", and thereafter as one of the permitted uses within each of the three Commercial Districts (C-1, C-2 and C-3) "Any use permitted in the R-2 District under § 270-12C"; and
>
> WHEREAS, the effect of this is that "single-family detached dwelling" is a permitted use in all districts referenced above though specifically called out only in the R-1(S) district; and
>
> WHEREAS, the City Building Official has interpreted the caveat "provided that no more than one main building may be erected on a single lot" permits only one single-family detached dwelling on a lot of any size and that this provision carries through to all zoning districts that in turn reference back to the R-1(S) zone; and
>
> WHEREAS, this interpretation and its application have been called into question by a recent decision of the Board of Adjustment; and
>
> WHEREAS, the Mayor and Commissioners of the City of Rehoboth Beach desire to affirm the Building Official's interpretation of the referenced code provision and to remove any uncertainty in its application.
>
> . . .
>
> Section 2. Chapter 270, of the Municipal Code of the City of Rehoboth Beach, Delaware, 2001, as amended be and the same is hereby further amended by adding a new Section 270-23.1 to read as follows:
>
> § 270-23.1 Number of single-family detached dwellings limited.

Within all districts, where permitted, no more than one single-family detached dwelling with its customary non-habitable accessory buildings may occupy or be constructed upon any lot.

A173.

Ordinance 1116-01, by its express terms, is effective upon adoption. It does not exempt pending applications, like Beachwalk, from the plain language of the Ordinance's requirements.[22]

Ordinance 1016-02 states in pertinent part:

Section 1. Chapter 270, Article V, of the Municipal Code of the City of Rehoboth Beach, Delaware, 2001, as amended be and the same is hereby further amended by adding a new Section 270-46.1.1 to read as follows:
. . .

§ 270-46.1.1 Street access required.

A. No building used in whole or part as a dwelling shall be constructed unless it complies with the following street access requirement:

(1) The primary entrance to any one or two-family dwelling shall be located within 100 feet of a public street. One and two-family dwelling shall be as defined in the International Residential Code adopted by the City at Chapter 102, Article XVII.

(2) The primary entrance to all other buildings, not a one or two-family dwelling, shall be located within 50 feet of a public street. This distance may be increased to not more than 100 feet if the building is provided with an automatic sprinkler system.

(3) A lot in single and separate ownership on (date of adoption) which has no public street frontage may have constructed thereon

[22] Monigle chastises the City for not appealing the BOA decision. OB 27. There was no need to do so – the Commissioners changed the law via Ordinance 1116-01 to reaffirm the decision of the Building Inspector.

> one single-family detached dwelling that does not conform to Subsection A(1) of this Section.

Just like Ordinance 1116-01, Ordinance 1016-02 by its express terms, is effective upon adoption. A71-72. It does not exempt pending applications, like Beachwalk, from the Ordinance's requirements.[23]

Monigle opposed the adoption of Ordinances 1116-01 and 1016-02. On October 21, 2016 when the Commissioners considered both Ordinances, Monigle's attorney spoke publically about the applicability of the Ordinances to the Beachwalk project and stated as follows:

> Obviously I'm not here in support of these two ordinances and I would like simply to point out that the application that my client filed began in June of 2015. . . . He [Plaintiff] has been to the board of adjustment and **clearly this one ordinance is intended to reverse an unpopular decision of the board of adjustment about one lot, one single family dwelling. Um, if I were to use a football term, I would say that my client has been targeted.** I know of no other client, no other property to which this ordinance would apply. The intent of this ordinance is to frustrate his lawful development of the property in some fashion, and uh to that extent we object to the application, [coughs] excuse me, and approval of this ordinance.

B25 (emphasis supplied).

Monigle did not challenge the adoption or validity of Ordinances 1116-01 and 1016-02, and the statute of repose for a challenge to the Ordinances has run.

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[23] As the Court of Chancery held, "[n]either of the 2016 Ordinances provides any affirmative language 'grandfathering in' applications already being processed." *Decision* *4.

Instead, on March 21, 2017, Monigle elected to appeal the Planning Commission's determination that under DUCIOA, read in conjunction with the City Code, a major subdivision is required. That appeal was made pursuant to Rehoboth Beach Code § 236-6A(3), which requires an on the record review of the matters decided by the Planning Commission, and commands that "[e]vidence and legal arguments not on the record of the hearing before the Planning Commission may not be presented to the Commissioners in writing or orally." On appeal, the Commissioners voted to uphold the Planning Commission's decision. A181-88. Applicability of Ordinances 1116-01 and 1016-02 to the Beachwalk application was not decided as part of the on the record appeal because those Ordinances were adopted after the Planning Commission's decision that a major subdivision for Beachwalk is required under DUCIOA.

C. The Superior Court Proceedings

On Valentine's Day 2018, Monigle sought *certiorari* review of the Commissioners decision regarding DUCIOA. On March 14, 2018, the City moved to dismiss the petition, contending that Ordinance 1116-01 governs the Beachwalk application and renders the *certiorari* action moot. A39. Thereafter, on September 19, 2018, the City filed a declaratory judgment action in Superior Court, seeking a ruling that Ordinances 1116-01 and 1016-02 govern the Beachwalk application. B37-49.

On March 19, 2019, the Superior Court reversed City Commissioners decision on the DUCOIA issue, and remanded the matter to City. B54-55. The Court, however, did not decide whether the 2016 Ordinances apply to Monigle's application, and the Court did not decide the City's declaratory judgment action. B50. The Court held that "I have decided that I cannot now determine whether Ordinance 1116-01 applies to 'Beach Walk' reasoning that this issue should, in the first instance, be presented to and decided by appropriate City officials."[24] *Id.*; B51.

Following the Superior Court's command, on May 17, 2019, the Commissioners, as the appropriate City officials, decided the issue when they passed Ordinance 0519-01 ("2019 Ordinance"). That Ordinance, which is codified at Rehoboth Beach Code § 236-6.1, states:

> Notwithstanding any other provision of the Rehoboth Beach Code to the contrary, any application submitted for a major subdivision, minor subdivision, site plan approval, partitioning or other division of land pending at the time of adoption Ordinances 1016-02 and 1116-01[1] and which are not finally approved as of April 1, 2019, shall comply with all requirements of Ordinances 1016-02 and 1116-01 prior to obtaining final approval and recordation.

A189-90.

[24] The City moved for a partial final judgment pursuant to Rule 54(b) in the certiorari action, which the Superior Court denied and held that, due to the remand, only an interlocutory appeal was permitted. B78-80. Thus, because the Superior Court remanded the appeal, no final decision which is appealable has been entered.

The intent of the Ordinance is unequivocal, as the following Whereas clause demonstrates:

> WHEREAS, the Commissioners seek to conclusively confirm that these important health, safety and welfare related Ordinances and code changes govern all projects and applications pending as of the date of the adoption of Ordinance 1016-02 and Ordinance 1116-01, and to remove any doubt that these Ordinances govern currently pending applications submitted before Ordinance adoption.

A189.

Monigle did not file any challenge to the validity of the 2019 Ordinance, and the statute of repose now bars any challenge.

D. The Chancery Action and Decision

Instead of challenging the 2019 Ordinance, Monigle filed this action, claiming vested rights and equitable estoppel, and seeking to be exempt from the requirements of Ordinances 1016-02 and 1116-01. Following discovery, the parties briefed and argued cross motions for summary judgment. Per the Court's request, on January 29, 2021, the parties submitted a detailed timeline of events applicable to the Beachwalk application. A033-040. Thereafter, the Court of Chancery advised the parties that the case turns on a "very narrow factual issue." Specifically, "whether the Plaintiff, when it began planning its redevelopment as a condominium rather than a subdivision, was entitled to rely in good faith on its interpretation of the City Code existing at the time." B206.

Following a one-day trial and written closing statements (B313-33) the Court of Chancery held that Monigle "did not reasonably rely on the prior City ordinances such that his rights became vested, and that equity requires neither a declaration to the contrary nor the application of estoppel against the Defendant."[25] The Court applied the *Cheswold* balancing test, and found that the adoption of the Ordinances represents an exercise of the police power and is in the public interest.[26] The Court of Chancery further noted that good faith reliance requires the Court to first question whether there was in fact reliance and then whether such reliance was reasonable.[27]

The Court found that Monigle had never read the Table of Use Regulations language prior to 2015, and had no reason to rely on any particular interpretation of the code at the time the Beachwalk application was submitted, outside of the statements of City personnel.[28] The Court also held that "[p]rovided that no more than one main building may be erected on a single lot" in the Table of Use Regulations "does not support the view that no subdivision was required."[29] The Court further held that Monigle is charged with knowledge of it for purposes of determining reasonable reliance.

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25 *Decision* *8.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* *9.

The Court also made factual findings regarding Schrader and Newcomb's communications with City officials. Regarding Schrader's conversation, where the Solicitor stated that a condominium was not a subdivision, the Court found it "insufficient . . . to provide a basis for reasonable reliance that the Site Plan, in particular, would constitute a condominium rather than a subdivision."[30] Regarding Newcomb's discussion and e-mail, "the August 26 email . . . does not in itself justify a finding of reasonable reliance" and "Plaintiff could not reasonably rely on the August 26 email as a full and final statement of the law."[31] The Court also rejected Monigle's other arguments, succinctly holding "[u]nder all these circumstances, Plaintiff's reliance on the legal status quo was not reasonable, and equity will not impose relief under the doctrine of vested rights."[32]

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30 *Id.* *10. Monigle argues that the *Decision* ignores Monigle's and the City's actions leading up to the BOA hearing. OB 25. This, again, is false. The Court painstakingly addressed each of Monigle's contentions, and found no good faith reliance under the totality of the circumstances. *Decision* *8-12.

31 *Id.*

32 *Id.* *12.

ARGUMENT

I. THERE CAN BE NO VESTED RIGHT WHEN MONIGLE WAS UNAWARE OF THE CODE PROVISION THAT WAS LATER ERRONEOUSLY DEEMED AMBIGUIOUS BY THE BOA

A. Question Presented

Should the Court of Chancery's holding that the totality of the evidence does not establish a vested right be overturned based on an erroneous subsequent finding of ambiguity by the BOA when the property owner was unaware of the one main building per lot requirement in the Table of Use Regulations and DUCOIA prior to submitting his application? This argument was raised below. B138-149; B180-92.

B. Scope and Standard of Review

The Court of Chancery's factual findings will not be overturned unless they are clearly erroneous – and the factual findings will not be set aside "unless they are clearly wrong and the doing of justice requires their overturn."[33] "The factual findings of a trial judge can be based upon physical evidence, documentary evidence, testimonial evidence, or inferences from those sources jointly or severally."[34] "That deferential standard applies not only to historical facts that are based upon credibility determinations but also to findings of historical fact that are based on physical or

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[33] *Bäcker v. Palisades Growth Capital II, L.P.,* 246 A.3d 81, 94 (Del. 2021) (citing cases).

[34] *Id.* at 95 (citing *Cede & Co. v. Technicolor, Inc.,* 758 A.2d 485, 491 (Del. 2000)).

documentary evidence or inferences from other facts."[35] "When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[36] Thus, where, as here, an equitable remedy exists and is applied using the correct standards "application of th[e] facts to the correct legal standards ... are reviewed for an abuse of discretion."[37]

C. Merits

The Court of Chancery correctly engaged in the *Cheswold* balancing test to determine whether Monigle had obtained a vested right to proceed with its development plans in contravention of the requirements of Ordinance. That test requires the Court to consider "*among other factors it sees as important*" "the nature, extent and degree of the public interest to be served by the ordinance amendment, the nature, extent and degree of the developer's reliance on the state of the ordinance under which he has proceeded—i.e., the developer's good faith reliance on existing standards . . ."[38] In addition, the Court is permitted to consider numerous other factors, including, but not limited to: (a) the ordinance's effects on public health and welfare; (b) whether the developer incurred major expense or made material

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35 *Id.* (citing *CDX Hldgs., Inc. v. Fox,* 141 A.3d 1037, 1041 (Del. 2016)).
36 *Id.* (citing *RBC Cap. Mkts., LLC v. Jervis,* 129 A.3d 816, 849 (Del. 2015)).
37 *Id.* (quoting *SIGA Techs., Inc. v. PharmAthene, Inc.,* 67 A.3d 330, 341 (Del. 2013)).
38 *Cheswold*, 188 A.3d at 821–22 (emphasis supplied).

progress toward obtaining approval before the ordinance's enactment; (c) any actions or statements made by municipality officials that the developer *reasonably and substantially* relied on; and (d) whether the developer was on notice or had reason to anticipate the ordinance's enactment prior to incurring expenses on the project.[39]

There is no bright line or objective formula for determining whether vested rights attached – rather the Court must engage in equitable balancing – and that is precisely the analysis that the Court undertook.[40]

Even though the Court made numerous findings, including, but not limited to: (1) there is a public interest in the Ordinance amendments; (2) that the plain language of the Table of Use Regulations statement that "no more than one main building may be erected on a single lot" "does not support the view that no subdivision was required"; (3) Monigle had never read the Table of Use Regulations language "prior to 2015, and thus had no reason to rely on any particular interpretation of the Code at the time the Site Plan was submitted;" (4) that Monigle's goal was to avoid "bringing attention to the subdivision issue;" and (5) Monigle actively avoided project concept review which "would have afforded an opportunity to discuss and design the Site Plan in close contact with the City,"[41] Monigle asserts three primary arguments he (erroneously) believes establish conclusive good faith reliance– the

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39 *Id.* at 822 n.62 (emphasis supplied).

40 *Decision* *7 (citing *In re Kent Cty.,* 2009 WL 445386, at **4, 8).

41 *Id.* *8-12.

ambiguity claim, the correspondence with Newcomb, and review of other condominium projects. Each are addressed below.

1. Post Application Ambiguity, As Determined by the BOA, Does Not Establish Good Faith Reliance.

Monigle cannot reasonably rely on a purportedly ambiguous statute when he did not know the Table of Use Regulations one main building per lot limitation existed until after he filed his Beachwalk application.[42] There is no way that Monigle could have known how the BOA would rule *before* he submitted the Beachwalk application because he was unaware of the requirement until *after* the Beachwalk application was submitted. In such a situation, the nature, extent and degree of the Developer's reliance "on the state of the ordinance under which he has proceeded – the developer's good faith reliance on existing standards" is nonexistent.

Even if Monigle knew of the requirements of the Table of Use Regulations prior to application, there was no certainty as to the meaning of the requirements of

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[42] *Lowe's,* 2001 WL 1729123, at *9-10 (stating that any hardship to Plaintiff was created by Plaintiff's failure to make an effort to confirm its own interpretation of the code)*; see also Hafner v. Zoning Hearing Bd. of Allen Twp.,* 974 A.2d 1204, 1212 (Pa. Commw. Ct. 2009) ("[t]he ZHB determined Applicant failed to meet the 'good faith reliance' requirement as neither he nor his father ever reviewed the relevant zoning ordinances. We agree."); *see also Megin v. Tuthill Fin.,* 2003 WL 21675898, at *4 (Conn. Super. Jun. 25, 2003) ("[s]elective ignorance of the law or elective non-information does not constitute due diligence").

the Table of Use Regulations. No tribunal had held that the language "no more than one main building may be erected on a single lot" was ambiguous until the BOA so held.[43] If Monigle knew of the language, even if he believed it was ambiguous, he was acting at his own risk that a tribunal would agree with his interpretation because, indeed, "the fact that . . . parties disagree about the meaning of a statute does not create ambiguity."[44] One simply cannot detrimentally rely on a statute where the meaning of it is uncertain. It would be no more than supposition for Monigle to conclude that the language, if reviewed, was ambiguous and then claim detrimental reliance on such ambiguity.

As the Court of Chancery aptly held regarding the no more than one main building requirement – "[t]his language does not support the view that no subdivision was required."[45] The existence of uncertainty regarding the meaning and application of the "no more than one main building may be erected on a single lot" language, especially in light of the Court's finding that such language *does not*

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[43] The City could have appealed the decision of the BOA – and it probably would have won because there is nothing ambiguous regarding the Table of Use Regulations requirement that "no more than one main building may be erected on a single lot." Instead, as was its option, it amended the Code to clarify that no more than one main building is permitted on a single lot by adopting Ordinance 1116-01.

[44] *Noranda Aluminum Hldg. Corp. v. XL Ins. Am. Inc.,* 269 A.3d 974, 979 (Del. 2021); *Ins. Comm'r of State of Del. v. Sun Life Assur. Co. of Can. (U.S.),* 21 A.3d 15 (Del. 2011).

[45] *Decision* *9.

support the view that no subdivision is required, precludes a finding of good faith reliance by Monigle.

The Court of Chancery properly held that Monigle was "in the uncomfortable position of asking this Court to find that it reasonably relied on the fixed nature of an ordinance that it has acknowledged was ambiguous, and which it knew the City construed as requiring subdivision."[46] When the City argues that the "no more than one main building can be erected on a single lot" language is unambiguous, and Monigle argues that the language is ambiguous, even if the BOA rules in Monigle's favor, the Court of Chancery correctly held that Monigle cannot realistically claim that he detrimentally relied when he knew that the City construed the language differently. It should have been no surprise to Monigle that, a few short months later, the Commissioners "desire[d] to affirm the Building Official's interpretation of the . . . [one main building per lot] code provision and to remove any uncertainty in its application." A073. Under the totality of the facts presented, as decided by the Court of Chancery, Monigle simply did not and could not rely on the BOA's ambiguity determination to establish a vested right.[47]

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46 *Decision* *10.

47 Monigle and the amicus argue that it was reasonable for him to rely on the "no more than one main building" code provision because it was ambiguous and then claim the Court of Chancery's decision this overrules authority, such as *Chase Alexa LLC v. Kent Cty. Levy Ct.*, 991 A.2d 1148, 1152 (Del. 2010), which stands for the proposition that ambiguous code provisions should be construed in favor of the

2. Newcomb's Exchange with the Building Inspector Does Not Establish Good Faith Reliance

There is no testimony anywhere in the record that supports Monigle's newly minted contention that the no more than one main building on a single lot language in the Table of Use Regulations was specifically discussed with the Building Inspector prior to plan submission. OB 26. Such testimony certainly was not solicited on direct. B287-93. The entire basis for Monigle's newly minted for appeal claim that the Table of Use Regulations requirement that no more than one main building can be located on a single lot was discussed with the Building Inspector is the following cross examination question and answer at trial:

> Q. And at any time in your discussions . . . you didn't discuss with Ms. Sullivan the table of use regulations in the code?
>
> A. Only as it relates to the subordinate nature of the structures.

B296.

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free use of land. *See* OB 3. The City submits that this rule of statutory construction is a rule of last resort and should not be applied unless all other rules of statutory construction do not resolve the statutory construction issue. Regardless, that doctrine is not overruled by the Opinion below because the municipality *always* has the right to amend its code because there is generally no vested right to any code provision relating the use of land. *See supra* notes 4-10. The vested rights test, as outlined in *Cheswold*, allows the Court to declare – via equitable balancing – that the ordinance amendment does not apply to a particular project if warranted. The equitable balancing under *Cheswold* does not overrule any canon of statutory construction – and the Court properly applied equitable balancing in deciding that Monigle did not satisfy the *Cheswold* test. Monigle and the amicus are attempting to create rights not recognized by law – not the other way around. *See* OB 24.

This testimony does not, in any way, support Monigle's contention that the one main building per lot requirement was discussed. For starters, there is no provision in the Table of Use Regulations that discusses the subordinate nature of the main dwelling. As Newcomb's letter indicates (A53), that requirement is in place in the R-1 District, which allows accessory uses as by right,[48] while the accessory use language is not included in the R-2 and C-3 districts concerning the subordinate nature of the main dwelling.[49] Because the Table of Use Regulations is devoid of any discussion of subordinate use provisions, it is clear that Newcomb's testimony relates the requirements in the *Zoning Code* and not in the *Table of Use Regulations*. There is no testimony – anywhere in the record – where Newcomb states that she discusses the no more than one main building on a single lot requirement with Sullivan.

The Court carefully considered Newcomb's testimony and the associated correspondence and held:

> Ms. Sullivan's email was not an official, or even an unofficial, approval of Beachwalk itself; in fact, Sullivan never purported to approve the Site Plan, although she also did not suggest that it required subdivision. The August 26 email might have been of some preliminary reliance value to the Plaintiff, but in context of the further Beachwalk-specific review to come, the Plaintiff could not reasonably rely on the August 26 email as a full and final statement of the law.[50]

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48 Rehoboth Beach Code § 270-11.

49 Rehoboth Beach Code §§ 270-12 (R-2); 270-15 (C-3).

50 *Decision* *10; OB Ex. B.

Even when the Building Inspector provides written correspondence, if the Building Inspector acts in error, Monigle is ultimately responsible for knowing the law applicable to his property.[51] Monigle "is charged with knowledge of" the one main building per lot requirement in the Table of Use Regulations, "for purpose[s] of determining reasonable reliance."[52] Very simply, the plain language in the Table of Use Regulations, as the Court of Chancery held, "does not support the view that no subdivision was required."[53]

3. Monigle's Review of Other Projects Does Not Establish Good Faith Reliance

The Court of Chancery directly addressed Monigle's contention that other condominium projects had been permitted in the City without a subdivision.[54] As

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[51] *See supra* n.8; *Voshell*, 1995 WL 656802, at *3 (holding after a permit was granted and later revoked "it remains the responsibility of the property owner . . . to know the zoning regulations and how they affect the property in question" even in light of the applicant's good faith); *Cheng*, 1994 WL 560866, at *3 (holding that even an erroneous statement by the Town Manager that a takeout resturant would be permitted, and where the statement was relied upon to purchase the property, it remained the responsibility of the landowner to know the regulations and how they impacted the property in question).

[52] *Decision* *10.

[53] *Decision* *9. Again, contrary to what Monigle contends (OB 29), the government may always amend the law in response to a judicial decision or if it otherwise sees fit in its legislative discretion. *Supra* notes 4-10. Whether the applicant has obtained a vested right is determined by the equitable balancing performed under the *Cheswold* test. The opinion below follows settled precedent – it does not change it.

[54] *Decision* *9.

noted by the Court, Monigle never offered any evidence regarding the state of the code when these projects were developed.[55] Absent any indication that Monigle had investigated the state of the code regarding when these developments were constructed, and absent any evidence *in the record* regarding the state of the code when these other condominiums (such as Philadelphia Place (OB 9)) were built, Monigle cannot establish reasonable reliance on them for purposes of the vested rights balancing test.[56]

4. Monigle's Reliance on Subdivision Approval Authority Is Misplaced

Monigle's reliance on *Tony Ashburn & Son, Inc. v. Kent Cty. Regional Planning Comm.*,[57] and *Delta Eta Corp. v. City Council of the City of Newark,*[58] is misplaced. OB 22-23. These cases stand for the proposition that a code compliant subdivision presented to the approval body must be approved, but reasonable conditions can be placed on the approval. The cases are inapplicable here – Delaware law is clear that "merely because the developer has started the land use approval process does not necessarily freeze the regulatory constraints on his

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55 *Id.*; OB Ex. B, n.7.

56 Monigle offered no testimony regarding when (or the state of the law when) Philadelphia Place was constructed. Similarly, Newcomb did not know when the Cottages at Philadelphia Place were approved. B300. As such, Monigle did not meet its burden of establishing reasonable reliance. *Decision* *9.

57 962 A.2d 235, 241 (Del. 2008).

58 2003 WL 1342476, at *4 (Del. Super. Mar. 19, 2003).

project."[59] Indeed, prior to *In re 244.5 Acres of Land*,[60] no vested right attached absent a grant of an approval (a permit) plus construction.[61] The vested rights test articulated in *Cheswold* is in place to establish, based on the factual circumstances, whether an ordinance amendment applies to anticipated or pending development plans because, even upon recordation of a plan, there is no vested right to a subdivision approval.[62] *Tony Ashburn* and *Delta Eta* (and the other cases Monigle cites) have no relevance to the vested rights analysis at issue here. They remain unaltered by the holding in this case.

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59 *In re Kent Cty.,* 2009 WL 445386, at *4.
60 808 A.2d 753, 757 (Del. 2002).
61 *Shellburne, Inc. v. Roberts,* 224 A.2d 250, 281–83 (Del. 1966).
62 *See supra* notes 4-10.

II. THE 2016 ORDINANCES ARE EFFECTIVE UPON ADOPTION AND THEREFORE APPLY TO PENDING APPLICATIONS

A. Question Presented

Does the plain language of Ordinances 1116-01 and 1016-02 provide grandfathered status for any pending applications such as Beachwalk when the Ordinances are plainly effective upon adoption? Raised argument below at B127-29; B148-49.

B. Standard and Scope of Review

Interpretation of Ordinances 1116-01 and 1016-02 presents a question of law that is reviewed *de novo*.[63]

C. Merits

When interpreting the Rehoboth Beach Code and/or the language of Ordinances 1116-01 and 1016-02, the Court is called upon to interpret statutory provisions. "The primary goal of statutory construction is to 'ascertain and give effect to the intent of the legislature.'"[64] Intent is determined by the plain language of the statute, and absent ambiguity, "there is no room for judicial interpretation and 'the plain meaning of the statutory language controls.'"[65] Absent ambiguity, the

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63 *Di's, Inc. v. McKinney*, 673 A.2d 1199, 1204 (Del. 1996).

64 *Acadia Brandywine Town Ctr., LLC v. New Castle Cty.*, 879 A.2d 923, 927 (Del. 2005) (citing *Dir. of Revenue v. CNA Hldgs., Inc.*, 818 A.2d 953, 957 (Del. 2003)).

65 *PHL Variable Ins. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011).

Court cannot look to legislative history to determine the meaning of the legislative enactment.[66]

There can be no dispute regarding the plain meaning and intent of Ordinance 1116-01. The Ordinance expressly states "the Mayor and Commissioners of the City of Rehoboth Beach desire to affirm the Building Official's interpretation . . . [and] remove any uncertainty in its application." A new section § 270-23.1 is added which states, "[w]ithin all districts, where permitted, no more than one single-family detached dwelling with its customary non-habitable accessory buildings may occupy or be constructed upon any lot." A173-74. The Ordinance is effective upon adoption, and nothing in the Ordinance exempts pending land use applications from its purview. Thus, as of the date of adoption, a major subdivision plan is required for the Beachwalk because no more than one building can be constructed on a single lot. The same is true for Ordinance 1016-02 – its provisions are expressly clear, there is no grandfathering language, and the Ordinances are effective upon adoption. A171-72.

Monigle contends that Ordinances 1116-01 and 1016-02 contain an "express command" that the "2016 Amendments should not be applied retroactively" (OB 3),

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[66] *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994) ("A court should not resort to legislative history in interpreting a statute where statutory language provides unambiguously an answer to the question at hand."); *Grand Ventures, Inc. v. Whaley,* 632 A.2d 63, 68 (Del. 1993); *Pellicone v. New Castle Cty.*, 88 A.3d 670, 675 n.21 (Del. 2014) (same).

but Monigle fails to cite any language in the ordinance to support its "express command" theory. While Monigle may want a limitation to be placed upon the statutory language of Ordinances 1116-01 and 1016-02 to exclude application of the Ordinances to Beachwalk, language cannot be added. Indeed, it is impermissible to "read into the statutory text words of restriction that were not included by the . . . legislature[] . . .".[67] Where a limitation is not set forth in the text of the statute, "it is reasonable to assume that the Legislature was aware of the omission and intended it."[68] And, as this Court has stated "Judges must take the law as they find it."[69]

Nothing in the Code or in the four corners of the 2016 Ordinances indicates that the Ordinances provisions would *not* apply to a pending land use application upon adoption. If it were the intent of the Commissioners to exempt pending applications from the Ordinances, they could have easily said so in writing – but no such provision was made. Monigle understood this – his attorney objected vigorously on the record when the Ordinances were considered in October 2016.[70]

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67 *In re Last Will & Testament & Tr. Agreement of Moor,* 879 A.2d 648, 652 (Del. Ch. 2005); *Stifel Fin. Corp. v. Cochran,* 809 A.2d 555, 560 (Del. 2002) ("in the absence of a specific legislative restriction, we cannot engraft a requirement that creates a further bar to a statutorily created remedy.").

68 *Giuricich v. Emtrol Corp.,* 449 A.2d 232, 238 (Del. 1982).

69 *Leatherbury v. Greenspun,* 939 A.2d 1284, 1292 (Del. 2007) (quoting *Ewing v. Beck*, 520 A.2d 653, 660 (Del. 1987)).

70 *See supra* p. 17 (quotation).

Monigle selectively quotes Section 3 (mistakenly cited as Section 2 – OB 30) of the Ordinances, and Section 270-84(C) of the Rehoboth Beach Code, claiming that these provisions somehow exempt Beachwalk from the reach of the Ordinances. *See* OB 4; 17-18; 30-32. But these provisions are nothing more than a codification of the pending ordinance doctrine.[71] These provisions only apply when an ordinance is pending – and not after. A174. Because the Ordinances are effective upon adoption, they apply to *all* applications immediately as of the effective date. Section 3 and Section 270-84(C)[72] are inapplicable following adoption of the ordinances because both are only applicable *until the Commissioners take action on the pending Ordinance*.

Monigle's brief states that there are a few instances in the record where different individuals indicated that Beachwalk might be grandfathered (OB 18-19, 31). But that is of no significance. As noted in *Kent County*, "the text of the ordinance is the most important (if not the only) guidance document" regarding a grandfathering provision.[73] Courts routinely decline to "construe the subjective

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[71] *See Covington v. Bd. of Adj. of City of Rehoboth Beach*, 2016 WL 724581, at *5 (Del. Super. Dec. 14, 2016), *aff'd,* 170 A.3d 779 (Del. 2017) (Table).

[72] 270-84(C) is nothing more than a subset dealing with pending ordinances to change zoning or use – if you need a building permit and if there is a pending zoning classification or use permitted change, there is a hold for 90 days or adoption. But there is nothing that exempts pending site plan/subdivision applications (such as Beachwalk) from the reach of subsequently adopted ordinances.

[73] *In re Kent Cty.,* 2009 WL 445386, at *6.

intent expressed by one or more legislators to reflect the objective intent" of the legislature as a whole.[74] Courts view legislative history objectively and established rules "of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators in enacting the" law.[75]

Here, the objective intent of the Ordinances is crystal clear – they are effective upon adoption and no grandfathering provisions were placed in the Ordinances for Beachwalk or any other pending application. Consequently, the Court of Chancery's holding "that a single Commissioner's statements at a public workshop cannot bind the City's Commissioners in its entirety, nor can the commentary of the Mayor or the City Solicitor"[76] must be sustained.[77]

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74 *Doe v. Pataki*, 120 F.3d 1263, 1277 (2d Cir. 1997) (quoting *Bae v. Shalala*, 44 F.3d 489, 494 (7th Cir. 1995)).

75 *Bilski v. Kappos*, 561 U.S. 593, 608 (2010).

76 *Decision* *11.

77 Monigle was well aware of the City's position that a subdivision was required via the "season of litigation in which the City made clear its intention that subdivision would be required for the Plaintiff's redevelopment." *Decision* *10.

III. THE COURT OF CHANCERY CORRECTLY HELD THAT MONIGLE DID NOT MEET HIS BURDEN OF ESTABLISHING ANY ENTITLEMENT TO EQUITABLE ESTOPPEL

A. Question Presented

Should the Court of Chancery's determination that Monigle failed to prove reasonable, good faith reliance upon governmental assurances sufficient to establish equitable estoppel be affirmed? This argument was raised below at B161-66.

B. Standard of Review

The Court of Chancery's factual findings will not be overturned unless they are clearly erroneous.[78] Where, as here, an equitable remedy exists and is applied using the correct standards "application of th[e] facts to the correct legal standards . . . are reviewed for an abuse of discretion."[79]

C. Merits

The standards for establishing equitable estoppel in a land use case are set forth in the Court of Chancery's decision in *Salem Church (Delaware) Associates v. New Castle County*.[80] The test requires Monigle to prove, by clear and convincing evidence, among other things: (1) that he lacked the means of discovering the facts in question; (2) that he acted in good faith; and (3) that there "are

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78 *Bäcker,* 246 A.3d at 94.

79 *Id.* at 95 (quoting *SIGA Techs., Inc. v. PharmAthene, Inc.,* 67 A.3d 330, 341 (Del. 2013)).

80 2006 WL 2873745, at *12 (Del. Ch. Oct. 8, 2006).

exceptional circumstances which make it *highly* inequitable or oppressive to enforce the regulations."

As the Court of Chancery held, and as discussed above, Monigle did not make a showing (let alone establishing a showing of clear and convincing evidence) of reasonable good faith reliance on any governmental assurances. As in *In re Kent County*,[81] it was not reasonable for Monigle to rely on the Mayor and Commissioners informal statements as to whether Beachwalk would be exempt from the 2016 Ordinances. Moreover, Monigle was on notice early on that the City might seek to clarify the Table of Use Regulations – even if the applicable law in 2015 included an ambiguity that Monigle tried to exploit.[82] Monigle had the means of discovering the facts in question (he could have read the code), did not act in good faith (he wanted to avoid subdivision at all costs, he did not read the applicable provisions in the code, he never presented an advance concept plan and did not seek project concept review, among others), and Monigle has not demonstrated any facts that make it highly inequitable to enforce the regulations. The Court of Chancery's findings are not clearly erroneous, and Monigle did not prove the equitable estoppel claim, nor the case as a whole, by clear and convincing evidence.

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81 2009 WL 445386, at *6.

82 *Decision* *13.

CONCLUSION

In the end, the facts as a whole, as found by the Vice Chancellor, demonstrate that Monigle did not act in good faith reliance on the state of the law under which he proceeded because, the Table of Use Regulations provided that only one main building can be constructed on a single lot (and he proposed 58 single family homes in a condo regime). Following submission of the Beachwalk application, and certainly upon introduction of Ordinances 1116-1 and 1016-02, Monigle knew and understood all along City's position that a major subdivision is required for Beachwalk. Because the Vice Chancellor's findings are grounded in the record, and are not clearly erroneous, the Court of Chancery's decision should be affirmed. [83]

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[83] While Monigle claims that the law was changed by the *Decision*, and this is an "existential moment for property owners" (OB 38), his contentions are wildly overblown. No prior precedent was overruled by the *Decision*. The Court applied settled precedent to the facts at bar and determined that when a property owner, who attempts to avoid subdivision to obtain double the density permitted, fails to read applicable provisions of the code, litigates, and thereafter an ambiguity is found, the City may thereafter amend the code without creating a vested right – especially when Monigle did not reasonably rely on the state of the code when he proceeded to attempt to build 58 single family dwellings on a single lot.